BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

THELMA CASTANEDA[1]	)	
Claimant	)	
VS.	)	
	)	
HCR MANOR CARE, INC.	)	Docket No. 1,057,344
Respondent	)	
AND	)	
	)	
INS. CO. OF STATE OF PENNSYLVANIA	)	
Insurance Carrier	)	

ORDER

STATEMENT OF THE CASE

Respondent and its insurance carrier appealed the November 15, 2011, preliminary hearing Order entered by Administrative Law Judge (ALJ) John D. Clark. Dale V. Slape of Wichita, Kansas, appeared for claimant. Donald J. Fritschie of Overland Park, Kansas, appeared for respondent and its insurance carrier (respondent).

The record on appeal is the same as that considered by the ALJ and consists of the preliminary hearing transcript with exhibits taken November 15, 2011; the deposition of Robin Stewart with exhibits taken November 11, 2011; the deposition of Tracy McDiffett with exhibit taken November 11, 2011; and all pleadings contained in the administrative file.[2]

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[1] It appears the correct spelling of claimant's surname is Castaneda rather than Castenada as in the caption of the November 15, 2011, preliminary hearing Order. See the signatures of claimant's name, presumably by claimant, on claimant's Application for Hearing and claimant's attorney fee contract, both filed on August 23, 2011, and claimant's Application for Preliminary Hearing filed on September 2, 2011.

[2] On December 1, 2011, the Board received a letter from respondent's attorney and medical records from Wesley Medical Center (Wesley) pertaining to claimant. The letter requested the Board to consider on appeal these medical records from Wesley. The medical records were not introduced as evidence, were not part of the record considered by the ALJ and, therefore, will not be considered by this Board Member.

ISSUE

Did claimant meet with personal injury by accident arising out of and in the course of her employment with respondent?

The ALJ found that claimant sustained a personal injury by accident on July 14, 2011, arising out of and in the course of her employment with respondent. He ordered temporary total disability benefits at the rate of $280.48 per week commencing July 15, 2011, until claimant is released. The ALJ also ordered respondent to furnish the names of two physicians for selection of one by claimant for treatment.

Respondent argues that claimant's accidental injury on July 14, 2011, did not arise out of and in the course of the employment and that the ALJ exceeded his jurisdictional authority in finding the respondent liable for claimant's benefits.

Claimant argues that the evidence supports the ALJ's findings regarding compensability and, therefore, the ALJ's Order should be affirmed.

FINDINGS OF FACT

After reviewing the record compiled to date and considering the parties' arguments, the undersigned Board Member finds:

Claimant testified that on Thursday, July 14, 2011, she helped a resident, M. G., from a bed to a wheelchair. At the time, claimant was wearing a gait belt. After completing this task, claimant stepped away and felt severe pain in her lower back. She indicated that the pain was so severe, she did not know if she would be able to walk out of the resident's room. The next morning claimant's severe pain continued and she went to see family physician Dr. Heather L. Roe. Dr. Roe prescribed some pain medication and claimant went home.

On Saturday, July 16, 2011, claimant woke up with severe back pain and called Dr. Roe who advised claimant to go to the emergency room. Claimant then sought treatment at the emergency room of Wesley Medical Center, Wichita, Kansas (Wesley). At Wesley claimant underwent both a lumbar spine x-ray and an MRI of the lumbar spine. The x-ray was unremarkable with no acute fracture or dislocation. The MRI showed edema in the pedicle and transverse process on the left at L5 possibly related to the trauma, but no evidence of displaced fracture or dislocation. The MRI also revealed mild facet degenerative changes at L4-L5, but no spinal canal or neural foraminal stenosis.

July 16, 2011, records from Wesley indicate that claimant reported severe pain in her lower back since "this past Thursday, 2 days ago, when she was transferring a lady to

a wheelchair at the nursing home where she works."[3] A report dictated on July 18, 2011, from a physician at Wesley states:

> The patient has been complaining of chronic lower back pain since October after a fall that happened at work. Before her admission, the patient had possibly an injury again to her back while she was moving one of the patient's *[sic]* in the nursing home where she worked and her lower back pain became exacerbated radiating to the left side of her hip.[4]

Claimant was discharged from Wesley on July 17, 2011, prescribed medications and told to follow up with her personal physician.

Claimant went to the office of family physician Dr. Mickey Myrick for her back pain on July 19 and August 2, 2011. On August 3, 2011, Dr. Myrick completed an Attending Physician Statement for MetLife in order for claimant to enroll for disability insurance benefits. The diagnosis provided on the statement was: "Lumbar Pedicle & transverse process trauma."[5] Claimant indicated she has not seen Dr. Myrick since August 2011 due to insurance issues.

Claimant testified that on Monday, July 18, 2011, she took a note from a doctor at Wesley to Robin Stewart, human resources director for respondent. Ms. Stewart did not ask claimant how she hurt her back. Claimant reported that her back was hurting to staffing coordinator Tracy McDiffett on July 18, 2011. Claimant testified that she told Ms. McDiffett that after transferring M. G., claimant felt bad pain in her back. Claimant told Ms. McDiffett the pain was still that way when she came out of M. G.'s room.

Ms. Stewart testified that claimant was injured at work in October 2010 when an intoxicated visitor of a resident grabbed claimant's shirt, causing her to fall. Claimant received medical treatment and was released in "early 2011."[6]

Ms. Stewart indicated that July 14, 2011, was the last day claimant worked at respondent's facility and that she had a conversation with claimant on July 25, 2011. Ms. Stewart testified:

> July 25th, she [claimant] told me she was in pain with her back and that she had been seeking medical treatment. I asked her what had happened. She said she did not know. She mentioned a resident the night of July 14th, but that that could

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[3] P.H. Trans., Cl. Ex. 2.

[4] *Id.*

[5] *Id.*, Cl. Ex. 1.

[6] Stewart Depo. at 5.

> not be the reason due to that resident was very low assist and she didn't do anything with that transfer. And she stated again she didn't know how or why she was having her back pain."[7]

Ms. Stewart explained a low assist patient is one where the employee does not have to be involved in great depth to transfer the patient. On July 26, 2011, claimant brought a note from her doctor stating she could not work to Ms. Stewart. Claimant, with Ms. Stewart's assistance, then completed Family Medical Leave Act (FMLA) benefits paperwork.

Ms. Stewart indicated a form completed by claimant's doctor as part of the FMLA paperwork stated claimant was injured on July 14 from transferring a patient. She called claimant and asked her about the doctor's statement. Ms. Stewart testified:

> I asked her why the doctor would put July 14th injury at work, and she said she did not know why he would put that, she was not injured July 14th, and that the only thing she could think of contributing to her current pain was the 10/31/10 injury.[8]

Ms. McDiffett testified that on July 18, 2011, she had a conversation with claimant. Ms. McDiffett was told by claimant that she had back pain and that it was hurting worse after she left M. G.'s room. Ms. McDiffett prepared a handwritten statement a couple of days later memorializing the conversation. The statement indicates claimant was crying and upset. It goes on to state:

> So I asked her what happened. She said she didn't know. She said her back had been hurting for a while, but lately it has been hurting so bad she can't move. Again, I asked her how she hurt her back and she said she didn't know. She stated it started hurting more after she left (I think) [M. G.'s] room. I asked her if she hurt it lifting on this resident, and she stated she didn't see how[,] because this resident doesn't require lifting[,] only slight assist.[9]

Ms. McDiffett indicated that M. G. weighs approximately 170 pounds and does not walk. When M. G. needs to move from the bed to the wheelchair, or from the wheelchair to the restroom or other activity, she is assisted by an attendant.

PRINCIPLES OF LAW

The 2011 legislative session resulted in amendments to the Workers Compensation Act. L. 2011, Ch. 55, Sec. 1 provides in relevant part:

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[7] *Id.*, at 6.

[8] *Id.*, at 8.

[9] McDiffett Depo., Ex. 1.

(c) The burden of proof shall be on the claimant to establish the claimant's right to an award of compensation and to prove the various conditions on which the claimant's right depends. In determining whether the claimant has satisfied this burden of proof, the trier of fact shall consider the whole record.

L. 2011, Ch. 55, Sec. 5 provides in relevant parts:

(d) "Accident" means an undesigned, sudden and unexpected traumatic event, usually of an afflictive or unfortunate nature and often, but not necessarily, accompanied by a manifestation of force. An accident shall be identifiable by time and place of occurrence, produce at the time symptoms of an injury, and occur during a single work shift. The accident must be the prevailing factor in causing the injury. "Accident" shall in no case be construed to include repetitive trauma in any form.

. . . .

(f)(1) "Personal injury" and "injury" mean any lesion or change in the physical structure of the body, causing damage or harm thereto. Personal injury or injury may occur only by accident, repetitive trauma or occupational disease as those terms are defined.

(2) An injury is compensable only if it arises out of and in the course of employment. An injury is not compensable because work was a triggering or precipitating factor. An injury is not compensable solely because it aggravates, accelerates or exacerbates a preexisting condition or renders a preexisting condition symptomatic.

. . . .

(B) An injury by accident shall be deemed to arise out of employment only if:

(i) There is a causal connection between the conditions under which the work is required to be performed and the resulting accident; and

(ii) the accident is the prevailing factor causing the injury, medical condition, and resulting disability or impairment.

(3)(A) The words "arising out of and in the course of employment" as used in the workers compensation act shall not be construed to include:

(i) Injury which occurred as a result of the natural aging process or by the normal activities of day-to-day living;

(ii) accident or injury which arose out of a neutral risk with no particular employment or personal character;

(iii) accident or injury which arose out of a risk personal to the worker; or

> (iv) accident or injury which arose either directly or indirectly from idiopathic causes.
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> . . . .
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> (g) "Prevailing" as it relates to the term "factor" means the primary factor, in relation to any other factor. In determining what constitutes the "prevailing factor" in a given case, the administrative law judge shall consider all relevant evidence submitted by the parties.

By statute the above preliminary hearing findings are neither final nor binding as they may be modified upon a full hearing of the claim.[10] Moreover, this review of a preliminary hearing Order has been determined by only one Board Member, as permitted by K.S.A. 2010 Supp. 44-551(i)(2)(A), as opposed to being determined by the entire Board when the appeal is from a final order.[11]

ANALYSIS

This Board Member affirms the finding of the ALJ that claimant sustained a personal injury by accident arising out of and in the course of her employment with respondent on July 14, 2011. Insufficient evidence was presented to contradict that on July 14, 2011, claimant injured her back while moving a resident. The day after the accident claimant did not work due to back pain, and sought treatment for her back injury from her family physician. Two days after the accident, claimant's back pain was so severe, she went to the emergency room at Wesley and was hospitalized for two days.

Respondent's chief argument is that claimant is not credible, and cites several facts to support this argument. Claimant testified her back pain was so bad on July 14, 2011, that she did not know if she would be able to make it out of the resident's room. Respondent argues that if claimant's back injury was so severe, why did she wait until July 26, 2011, to report the injury? This argument ignores the fact that claimant told Ms. McDiffett of the accident and back injury on July 18, 2011. No testimony was presented as to why claimant did not report the accident to a supervisor on the day it occurred. The fact that claimant gave respondent notice four days after the accident does not make her less credible. Nor does the fact that claimant sought medical treatment before reporting the accident to respondent mean that she is not credible.

The records of Wesley and Dr. Myrick corroborate claimant's version of how she injured her back. As indicated above, a report from a physician at Wesley states: "Before her admission, the patient had possibly an injury again to her back while she was moving one of the patient's *[sic]* in the nursing home where she worked . . . ." Simply put, claimant

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[10] K.S.A. 44-534a.

[11] K.S.A. 2010 Supp. 44-555c(k).

met her burden of proving by a preponderance of the evidence that she suffered a back injury as the result of an accident on July 14, 2011, arising out of and in the course of her employment with respondent.

CONCLUSION

The ALJ did not exceed his jurisdiction. Claimant sustained a back injury by accident on July 14, 2011, arising out of and in the course of her employment with respondent.

WHEREFORE, the undersigned Board Member affirms the November 15, 2011, preliminary hearing Order entered by ALJ John D. Clark.

IT IS SO ORDERED.

Dated this ____ day of January, 2012.

THOMAS D. ARNHOLD
BOARD MEMBER

c: Dale V. Slape, Attorney for Claimant
Donald J. Fritschie, Attorney for Respondent and its Insurance Carrier
John D. Clark, Administrative Law Judge